Supreme Court, U.S.
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No.

IN THE SUPREME COURT OF THE UNITED STATES

_____Term, _____

CARMEN JOHN PALMIERI,

Petitioner

v.

GEORGE GIURBINO,

Respondent.

On Petition For a Writ of Certiorari to the Ninth Circuit Court of Appeals

PETITION FOR WRIT OF CERTIORARI

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Questions Presented

Whether imposition of two unconstitutional upper term sentences under *Apprendi, Blakely,* and *Cunningham*[1] can be deemed harmless error where the sentencing court could have instead imposed middle term sentences for both offenses and then imposed a different sentence on other counts of conviction in order to arrive at the same total, aggregate term of imprisonment, and whether the Ninth Circuit Court of Appeals' decision that it can conflicts with this Court's decision in *Apprendi,* as well as the decisions of other Circuit Courts of Appeals.

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[1] *Apprendi v. New Jersey,* 530 U.S. 466, 490, 147 L. Ed. 2d 435, 120 S.Ct. 2348 (2000); *Blakely v. Washington,* 542 U.S. 296, 159 L. Ed. 2d, 124 S.Ct. 2531 (2004); *Cunningham v. California,* 549 U.S. ___, 127 S.Ct. 856 (2007).

Parties to the Proceedings

The parties to the proceedings in the Ninth Circuit Court of Appeals included petitioner Nathan Lee and warden George Giurbino. There are no parties to the proceedings other than those named in the petition.

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Certificate of Word Count ..... filed separately

Certificate of Service ..... filed separately

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A. Decision of the Ninth Circuit Court of Appeals, affirming the decision of the United States District Court, filed October 2, 2007.

B. Decision of the United States District Court Magistrate, denying 28 U.S.C. § 2254 Petition for Writ of Habeas Corpus, and granting a Certificate of Appealability, filed December 7, 2006.

C. Order of the Ninth Circuit Court of Appeals, denying Petition for Panel Rehearing, filed October 25, 2007.

D. Order of the California Supreme Court, denying review without prejudice to any relief to which petitioner might be entitled under *Blakely v. Washington*, filed June 29, 2005.

E. Decision of the California Court of Appeal, affirming the judgment of the California Superior Court, filed April 14, 2005.

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IN THE SUPREME COURT OF THE UNITED STATES

_____Term, _____

CARMEN JOHN PALMIERI,

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v.

GEORGE GIURBINO,

Respondent.

On Petition For a Writ of Certiorari to the Ninth Circuit Court of Appeals

PETITION FOR WRIT OF CERTIORARI

The petitioner, Carmen John Palmieri, respectfully petitions this Court for a writ of certiorari to review the judgment and opinion of the Ninth Court of Appeals, filed on October 2, 2007.

Opinions Below

The unpublished decision of the Ninth Circuit Court of Appeals, which is the subject of this petition, was filed on October 2, 2007, and is attached as Appendix (App.) A.

The unpublished decision of the United States District Court denying a 28 U.S.C. § 2254 Petition for Writ of Habeas Corpus and granting a Certificate of Appealability was filed on December 7, 2006, and is attached as Appendix B.

The Ninth Circuit Court of Appeals' Order denying petitioner's Petition for Panel Rehearing was filed on October 25, 2007, and is attached as Appendix C.

The California Supreme Court's one-page order denying discretionary review without prejudice to any relief to which petitioner might be entitled under *Blakely v. Washington* was filed on June 29, 2005, and is attached as Appendix D.

The unpublished decision of the California Court of Appeal affirming the judgment of the California Superior Court was filed on April 14, 2005, and is attached as Appendix E.

Jurisdiction

The decision of the Ninth Circuit Court of Appeals to be reviewed was filed on October 2, 2007, and panel rehearing was denied on October 25, 2007. This petition is filed within 90 days of this latter date. Rules 13.1, 13.3. Petitioner invokes this Court's jurisdiction under 28 U.S.C. section 1254(1).

Constitutional and Statutory Provisions Involved

A. Federal Constitutional Provisions

The Sixth Amendment of the United States Constitution provides, in pertinent part: "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed ...."

The Fourteenth Amendment provides: "No State shall . . . deprive any person of life, liberty, or property, without due process of law ...."

B. State Statutory Provisions

California Penal Code section 368, subdivision (d), provides in pertinent part:

> "Any person who is not a caretaker who violates any provision of law proscribing theft, embezzlement, forgery, or fraud, ..., with respect to the property or personal identifying information of an elder or a dependent adult, and who knows or reasonably should know that the victim is an elder or a dependent adult, is punishable by imprisonment in a county jail not exceeding one year, or in the state prison for two, three, or four years, ..."

California Penal Code section 186.11, subdivisions (a)(1) and (a)(2), provide in pertinent part:

> "(a) (1) Any person who commits two or more related felonies, a material element of which is fraud or embezzlement, which involve a pattern of related felony conduct, and the pattern of related felony conduct involves the taking of more than one hundred thousand dollars ($100,000), shall be punished, upon conviction of two or more felonies in a single criminal proceeding, in addition and consecutive to the punishment prescribed

> for the felony offenses of which he or she has been convicted, by an additional term of imprisonment in the state prison as specified in paragraph (2) or (3). This enhancement shall be known as the
>
> aggravated white collar crime enhancement. ...
>
> "(a)(2) If the pattern of related felony conduct involves the taking of more than five hundred thousand dollars ($500,000), the additional term of punishment shall be two, three, or five years in the state prison."

Statement of the Case

Petitioner is entitled to a reversal and remand for resentencing in light of this Court's decisions in *Apprendi v. New Jersey*, 530 U.S. 466 (2000) ("*Apprendi*"), *Blakely v. Washington*, 542 U.S. 296 (2004) ("*Blakely*"), and *Cunningham v. California*, 549 U.S. ___ (2007).

In connection with the fraudulent sale of securities, Petitioner was charged with 58 counts of grand theft (Pen. Code § 487(a)), 58 counts of making a false statement in connection with the sale of a security (Corp. Code §§ 25401, 25540),

and 28 counts of grand theft from an elder (Pen. Code § 368(d)). It was further alleged that the aggregate losses to the victims exceeded $2,500,000 within the meaning of Penal Code section 12022.6(a)(4), and that petitioner engaged in a pattern of fraudulent activity which involved the taking of more than $500,000 within the meaning of Penal Code section 186.11(a)(2). Petitioner pleaded no contest to all 144 counts and admitted the special allegations. App. E, pp. 1-2.

The sentencing court imposed two upper term sentences, an upper term of four years for his Penal Code § 368(d) conviction in Count 33, and an upper term of five years for the Penal Code § 186.11(a)(2) monetary enhancement. The court also imposed consecutive middle term sentences for several other counts, bringing the total aggregate sentence to 30 years in prison. Sentence on the remaining counts of conviction was either stayed or imposed concurrently. App. E, p. 4.

In the state court of appeal, petitioner, citing the Sixth and Fourteenth Amendments and this Court's decision in *Blakely v. Washington*, 542 U.S. 296, *supra*, argued that the judicial fact-finding at sentencing used to impose the two upper term sentences in this case violated his

federal constitutional rights to a jury trial and proof beyond a reasonable doubt.

The California Attorney General contended: 1) petitioner's claim was procedurally barred; 2) petitioner's claim was forfeited; 3) there was no error under *Blakely*; and 4) any error was harmless. App. E, p. 2.

The California Court of Appeal rejected each of the Attorney General's first three arguments, but agreed with the fourth argument, finding that the sentencing error under *Blakely* was harmless because the sentencing court could have imposed the same aggregate sentence without imposing any upper term sentences in violation of *Blakely*. App. E, pp. 4-13.

Petitioner sought discretionary review in the California Supreme Court, and that court summarily denied review. App. D.

Petitioner then filed a 28 U.S.C. §2254 petition for writ of habeas corpus in the United States District Court for the Southern District of California, raising his assertion of sentencing error under *Blakely*.

The United States District Court denied the petition on the merits, ruling that: 1) petitioner's claim was barred by principles of retroactivity; 2)

there was no sentencing error; and 3) any error was harmless. Although it denied the petition, the District Court issued a Certificate of Appealability. App. B.

Petitioner then appealed into the Ninth Circuit Court of Appeals. On such appeal, the Ninth Circuit ruled that the District Court erred in denying the petition based upon principles of retroactivity and also erred in finding that no error was committed. However, the Ninth Circuit agreed with the District Court that the sentencing error was harmless because the sentencing court could have imposed the same aggregate term of 30 years without any imposing any upper term sentences in violation of *Blakely* by instead imposing sentence for some other counts consecutively. App. A.

The Ninth Circuit Court of Appeals further denied a Petition for Panel Rehearing on the harmless error issue filed by petitioner. App. C.

Reasons for Granting the Writ

Certiorari should be granted in this case for the following three reasons: 1) In order to define the appropriate scope of harmless sentencing error in general, and in particular under *Apprendi*, *Blakely*, and *Cunningham*; 2) Because the Ninth Circuit's determination that the error herein was harmless appears to conflict with this Court's decision in *Apprendi*; and 3) Because the Ninth Circuit's finding of harmless error appears to be in conflict with the definition of harmless sentencing error articulated in other Circuit Courts of Appeals

At issue herein is whether, in a case involving multiple counts of conviction, one or more unconstitutional state upper term sentences may properly be deemed harmless error because the record indicates that the state sentencing court could have and would have imposed the same aggregate, cumulative sentence for all counts of conviction in a different, constitutional manner absent the error.

Without citation to any authority in support of the proposition, the Ninth Circuit Court of Appeals held that imposition of unconstitutional upper term sentences may be deemed harmless error if the record indicates the sentencing court would have imposed the same aggregate total term of years for all convictions by instead

imposing consecutive sentences on other counts of conviction for which concurrent sentences were previously imposed. App. A, p. 2.

Petitioner urges that the harmless error rule should not be applied to imposition of unconstitutional sentences in this context. A *Blakely* violation may properly be deemed harmless where the record demonstrates that the sentencing court would have imposed the same sentence had there been no *Blakely* violation. See *Washington v. Recuenco*, 126 S.Ct. 1546, 2553 (2006). Petitioner urges, however, that unconstitutional sentences may not be deemed harmless because the sentencing court could have and would have imposed a different sentence, albeit one that ultimately arrived at the same aggregate term, in a constitutional manner.

In other words, a finding of harmless error is appropriate where the record demonstrates that the error did not affect the actual sentence imposed. However, a finding of harmless error is not appropriate where the record only demonstrates that absent the error, the court would have imposed a different sentence that would have culminated in the same aggregate term. In short, every defendant's sentence should be constitutional both in sum and in part.

In addition to promoting imposition of constitutional sentences both in sum and in part, there are sound policy reasons for such a rule. Allowing unconstitutional portions of a sentence to stand based upon a determination that the cumulative term is proper would lead to anomalous results in cases in which only some counts of conviction were later reversed on appeal or habeas corpus petition.

For example, if a conviction on a count in which the court imposed an unconstitutional upper term sentence was later reversed due to newly discovered evidence, the defendant would stand to gain a windfall because a greater portion of his sentence would be reversed than what was required by law. On the other hand, if a different defendant obtained reversal of a conviction on a count in which a concurrent term was initially imposed, but for which a consecutive term would have been imposed had the sentence been constitutional, the People would receive a windfall because reversal of such a conviction would not reduce the defendant's sentence.

Moreover, petitioner urges that a finding of harmless error in this context is precluded, and contrary to, this Court's decision in *Apprendi*.

In *Apprendi*, respondent in that case, the State of New Jersey, argued that even without the

trial court's error in enhancing the sentence on the principal count, the court could have imposed the same aggregate 12-year term of imprisonment by imposing a lesser sentence on the principal assault count and then imposing consecutive sentences for other counts. This Court rejected that attempt to justify the punishment, stating that the "constitutional question" was whether the 12-year sentence imposed on the principal count was permissible. (*Apprendi v. New Jersey, supra,* 530 U.S. at p. 474.) In reversing the defendant's sentence, the fact that there were other ways for the judge to have arrived at the same aggregate sentence, the Court deemed of "no ... relevance." (*Ibid.*)

As in *Apprendi,* the constitutional question herein is whether petitioner's current sentence is constitutional, and the fact that the same aggregate sentence could have been imposed in a different, lawful manner is also of no relevance.

For the above reasons, petitioner respectfully requests this Court grant certiorari and address whether the error herein can be deemed harmless in light of *Apprendi.*

Finally, petitioner notes that the Ninth Circuit's decision appears to conflict with the harmless error tests as stated in other Courts of Appeals. Although these decisions have not addressed the precise issue herein, their

statement of the appropriate test supports petitioner's interpretation of the appropriate application of the harmless error rule.

For example, the Third and Eighth Circuit Courts of Appeals have stated that an *Apprendi/Blakely/Booker*[1] error may be deemed harmless if the record demonstrates that the sentencing court would have imposed the "identical" sentence absent the error. See *United States v. Hill*, 411 F.3d 425, 426 (3rd Cir. 2005); *United States v. Meyer*, 427 F.3d 558, 560 (8th Cir. 2005). Similarly, the First, Seventh, and Eleventh Circuits have stated that such error can be deemed harmless where the record discloses the sentencing court would have imposed the "same" sentence. See *United States v. Vazquez-Rivera*, 407 F.3d 476, 490 (1st Cir. 2005); *United States v. Paladino*, 401 F.3d 471, 482 (7th Cir. 2005); *United States v. Robles*, 408 F.3d 1324, 1327 (11th Cir. 2005).

Consistent with the above decisions, petitioner's sentence cannot properly be deemed harmless because the court would have imposed a different sentence, albeit one in which the cumulative time for all counts of conviction totaled the same amount.

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[1] *United States v. Booker*, 543 U.S. 220, 125 S.Ct. 738, 160 L.Ed.2d 621 (2005).

CONCLUSION

For the foregoing reasons, and in the interests of justice, petitioner respectfully requests this Court grant certiorari.

Dated: 12/17/07

Respectfully submitted,

Eric Larson

Eric R. Larson
Attorney for Petitioner

Appendix A

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

CARMEN JOHN PALMIERI)	
	) No.: 06-56739
petitioner- Appellant,	)
	) D.C. No. CV-06-01201
v.	) LSP
	)
GEORGE GIURBINO,	) MEMORANDUM*
	)
Respondent- Appellee.	)
	)

Appeal from the United States District Court
For the Southern District of California
Leo S. Papas, Magistrate Judge, Presiding

Submitted September 28, 2007**
Pasadena, California

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* This disposition is not appropriate for publication and is not precedent except as provided by 9th Cir. R. 36-3.

** This panel unanimously finds this case suitable for decision without oral argument. See Fed. R. App. P. 34(a)(2).

Before: T.G. NELSON, IKUTA, and N.R. SMITH, Circuit Judges.

The district court erred by holding that the retroactivity doctrine barred Palmieri's claim under Blakely v. Washington, 542 U.S. 296 (2004), because Palmieri's conviction was not final when Blakely was announced -- Palimieri had not yet exhausted his state appeals. See-Teague v. Lane, 489 U.S. 288, 295 (1989). The district court also erred by holding that Blakely was not violated because Palmieri admitted the facts necessary for an enhancement. Nothing in the record establishes that Palmieri admitted anything beyond the elements of the crime itself. Nor does anything in the record establish that he knowingly and voluntarily waived his right to have a jury find the aggravating facts.

Nonetheless, violations of Blakely are reviewed under a harmless error standard. See Washington v. Recueno, 126 S.Ct. 2546, 2553 (2006). The California Court of Appeal determined that the Blakely error at Palmieri's sentencing was harmless beyond a reasonable doubt, applying Chapman v. California, 386 U.S. 18 (1967). This was not an unreasonable application of Supreme Court precedent. See 28 U.S.C. § 2254 (d)(1).

It is clear that the state trial court intended to impose a thirty-year sentence, irrespective of the enhancement at issue in this appeal. It is also clear that the court could and would have imposed such a sentence on the basis of the entirety of the 144 counts, even without resort to the upper-term enhancements. Accordingly, the California Court of Appeal reasonably applied Supreme Court precedent when it concluded that any error by the state trial court was harmless. See also United States v. Zepeda-Martinez, 470 F.3d 909, 912-14 (9th Cir. 2006).

AFFIRMED.

APPENDIX B

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF CALIFORNIA

CARMEN JOHN PALMIERI,	) Civil No. 06cv1201-LSP
Plaintiff,	)
	) ORDER:
	)
	) (1) DENYING
v.	) PETITION FOR
	) WRIT OF HABEAS
	) CORPUS
	)
	) (2) ISSUING A
GEORGE GIURBINO,	) CERTIFICATION
	) OF
Defendant,	) APPEALABILITY
_____	)

Petitioner Carmen John Palmieri ("Petitioner"), a state prisoner represented with counsel, filed a Petition for Writ of Habeas Corpus pursuant to 28 U.S.C. § 2254, challenging his sentence in San Diego Superior Court case number D043617. Respondent George Giurbino ("Respondent") has filed an Answer to the Petition. Petitioner has filed a Traverse to Respondent's Opposition. On August 16, 2006, Petitioner and

Respondent stipulated to the undersigned's jurisdiction for all issues raised in this case.

I.

Factual History

On November 17, 2003, Petitioner plead no contest to fifty-eight counts of grand theft, fifty-eight counts of making false statements in connection with the sale of a security and twenty eight counts of theft over $400.00 from an elderly person or dependent adult. The Parties stipulated that the factual basis for the Petitioner's plea would be derived from the preliminary hearing transcript and the prosecution's investigative reports. (Respondent's Lodgment No. 3, at 3). The following facts are taken from those documents.

From the early 1999 to late 2001, Petitioner defrauded approximately 190 investors of nearly 13 million dollars by soliciting victims to invest in viatical contracts that were never obtained. Twenty-eight of the victims were over 65 years old.

In 1996, Petitioner obtained a license to sell viatical contracts[1] in California. Then, in San Diego,

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[1] A viatical contract involves the purchase of life insurance policy for the life of a terminally ill person (the viator) by a settlement company. The settlement company reviews the medical

he established a viatical settlement company. National Medical Funding. National Medical Funding was incorporated and solely owned by Petitioner who was listed as the President of the Company. National Medical Funding advertised in gay and lesbian magazines hoping to attract those terminally ill suffering from AIDS. Petitioner's company also advertised in senior publications.

In addition to National Medical Funding, Petitioner also established Trust Management Services. Petitioner advertised Trust Management Services as an independent escrow company, which is a legal requirement for the sale of viaticals. However, Trust Management Services was comprised of only a mail drop at Mail Boxes Etc. in San Francisco, California. Petitioner was discovered to be the sole controller of Trust Management Services, an unlawful interest in the viatical settlement context.

Investors were told that to invest in viatical contracts, they should deposit their funds with Trust Management Services. Investors were led to

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history of the viator and solicits funds from the potential investors to fund the purchase of a life insurance policy. Viators benefit by receiving payments while they are still alive, and investors receive a proportionate percentage of the policy benefits upon the death of the viator.

believe that Trust Management Services was an independent escrow company, when it was, in fact, owned and operated by Petitioner. Investors then would receive letters from both Trust Management Services, confirming their deposits, and from the National Medical Funding, identifying the name of a viator, the name of the viator's life insurance company, and confirming that the investor had been named the irrevocable beneficiary of the viator's life insurance policy. All correspondence was signed by Lawrence C. Reed, a former business associate of Petitioner. It was later discovered that Reed's signature had been forged and his name was used without his knowledge.

No viatical contracts were ever purchased on behalf of investors. Rather, the money procured from investors was withdrawn from Trust management Services and paid to either the Petitioner personally or to his various other business interests. In total, Petitioner deposited approximately $32 million dollars in to the Trust Management Services account between January 1999 and May 2002. Of the $32 million, $21.3 million came from investors.

Petitioner gave investors 12 to 14 month income projections concerning the maturity of their investments. When investors did not receive payment, they attempted to contact Reed (the

name appearing on all correspondence from trust management Services). Most efforts were unsuccessful and investors were seldom able to speak to Petitioner. Most calls were forwarded to an answering service. Investors' efforts to obtain payment resulted in receipt of insufficient fund checks, partial payments, and deflection of payment inquiries with promises to roll investments into other viatical accounts.

Investors' complaints to the Department of Corporations eventually caused the execution of several search warrants in March 2002 at Petitioner's corporate offices, several related businesses, storage facilities and his residence. The search uncovered a script used to procure investors and a list of potential viators. On October 23, 2002, an arrest warrant was issued and Petitioner was apprehended by authorities.

II.

Procedural History

On November 17, 2003, Petitioner plead no contest to fifty-eight counts of grand theft [California Penal Code § 25401 and 25540), and twenty-eight counts of theft over $400.00 from an elderly or dependant adult [California Penal Code

§ 368 (d)].[2] Petitioner is currently serving an aggregate term of 30 years in prison.

Petitioner's sentence was composed of an upper term of four years for the §368(d) theft alleged in Count 33, and consecutive one-year terms (one-third of the middle term) on 21 other counts alleging theft in violation of 368(d) The court also imposed a consecutive five-year upper term for the §186.11(a)(2) enhancement. The court imposed concurrent terms on 40 other counts, and stayed the sentence on the remaining counts under § 654, (Lodgment No. 6 at 4).

On April 14, 2005, the California Court of Appeal affirmed Petitioner's convictions. On June 29, 2005, the California Supreme Court denied the Petitioner's Petition For Review. On June 7, 2006, Petitioner filed a Petition for Writ of Habeas Corpus in this Court. On June 15, 2006, the Petition was denied without prejudice. On June 20, 2006, Petitioner filed a "First Amended Petition" and Respondent timely filed an Answer.

On the date Petitioner entered his guilty plea, the United States Supreme Court had already decided *Apprendi v. New Jersey*, 530 U.S. 466 (2000), which holds that: "Other than the fact of a prior conviction, any fact that increases the

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[2] All further references to code sections are to the California Penal Code.

penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt." Id. at 490. However, the Supreme Court had not yet announced its decision in *Blakely v. Washington*, 542 U.S. 296 (2004), in which the Court defined the term "statutory maximum" as used in *Apprendi* to mean "the maximum sentence a judge *may impose solely on the basis of the facts reflected in the jury verdict or admitted by the defendant.*" Id. at 303 (emphasis in original).

On direct appeal, Petitioner claimed that his sentence violated *Blakely* because the trial judge imposed two upper term sentences[3]. The imposition of the upper term sentences was based on facts taken from the probation officer's report and admitted by Petitioner at the change of plea hearing. (Lodgment No. 1, Vol. 1). Petitioner claimed that because the facts used by the sentencing judge to impose the upper term sentences were found under a preponderance of the evidence standard, the results amounted to a denial of his rights to have a jury determine, beyond a reasonable doubt, all facts essential to his punishment as guaranteed by the Fifth, Sixth, and Fourteenth Amendments within the meaning of *Blakely* and *Apprendi*.

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[3] The sentencing judge imposed the upper term for violation of § 368 (d) and § 186.11 (a)(2).

Petitioner further contended that the trial court erred in failing to cite any aggravating factors as required by the California Rules of Court, Rule 421, and did not expressly state which aggravating factors the trial court judge used in sentencing him to the upper term on two counts of the indictment. Petitioner pointed to the trial judge's language at sentencing to infer that the amount of money stolen and the age of the victims were the only two aggravating factors considered by the trial judge.

On September 1, 2004, the California Supreme Court denied Petitioner's Petition for review. The California Supreme Court's order stated: "Petition for review denied without prejudice to any relief to which defendant might be entitled upon finality of *People v. Black*, 113 P.3d 534 (Cal. 2005) regarding the effect of *Blakely v. Washington*, (2004) 542 U.S. __. 124 S.Ct. 2531, and United States v. Booker (2005) 543 U.S. __., 125 S.Ct 738, on California Law." (Lodgment No. 6).

Here Petitioner contends that his sentence was increased above that would have been imposed had the trial court selected the middle term on count 33 and not imposed the upper term for a violation of §186.11(a)(2).[4] Petitioner

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[4] Both enhancements each increased Petitioner's sentence by one year.

contends he was denied his right to have a jury determine beyond a reasonable doubt all facts essential to his punishment as guaranteed by the Fifth, Sixth, and Fourteenth Amendments, because the facts relied on by the trial judge were taken from the probation officer's report and were made under a preponderance of the evidence standard.

III.

Standard of Review

Title 28, United States Code, § 2254 (d), sets forth the following scope of review for federal habeas corpus claims:

> d) An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall not be granted with respect to any claim that was adjudicated on the merits in State court proceedings unless the adjudication of the claim-

> (1) resulting in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States; or
>
> (2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding.

28 U.S.C.A. § 2254 (d)(1)-(2) (West Supp. 2004).

To obtain federal habeas relief, Petitioner must satisfy either § 254 (d)(1) or § 2254 (d)(2). See *Williams v. Taylor*, 529 U.S. 362, 403 (2000). The Supreme Court interprets § 2254 (d)(1) as follows:

> Under the "contrary to" clause, a federal habeas court may grant the writ if the state court arrives at a conclusion opposite to that reached by this Court on a question of law or if the state court decides a case differently that his Court has on a set of materially indistinguishable facts. Under the "unreasonable application" clause, a federal habeas court may grant the writ if the state court identifies the correct governing legal principle from this Court's decisions but unreasonably applies that principle to the facts of the prisoner's case.

Williams, 529 U.S. at 412-13; see also *Lockyer v. Andrade*, 538 U.S. 63, 75-76 (2003).

Where there is no reasoned decision from the state's highest court, the Court "looks through" to the underlying appellate court decision. *Yist v. Nunnemaker*, 501 U.S. 797, 801-06 (1991). If the dispositive state court order does not "furnish a basis for its reasoning", federal habeas court s must conduct an independent review of the record to determine whether the state court's decision is contrary to, or an unreasonable application of, clearly established Supreme Court law. See *Delgado v. Lewis*, 223 F. 3d 976, 982 (9th Cir. 2000) (overruled on other grounds by *Lockyer*, 538 U.S. at 75-76); *Himes v. Thompson*, 336 F. 3d 848, 853 (9th ir. 2003). However, a state court need not cite Supreme Court precedent when resolving a habeas corpus claim. *Early v. Packer*, 537 U.S. 3, 8 (2002). "[S]o long as neither the reasoning not the result of the state-court decision contradicts [Supreme Court precedent]" Id., the state court decision will not be "contrary to" clearly established federal law.

IV.

Analysis

The California Supreme Court decided in *Black* that California's sentencing scheme survived a *Blakely* and *Booker* challenge to the imposition

of an upper term because the statutorily enumerated factors permitted to be considered by a judge involve the type of judicial factfinding that has been traditionally performed by a judge in the context of exercising sentencing discretion, and are not the type of factfinding traditionally engaged in by a jury. *People v. Black*, 35 Cal.4th 1238, 1254-58 (2005), *pet. for cert. filed* (No. 05-6793) (Sep. 28, 2005). It is particularly relevant here that *Black* involved a case in which there was a plea of guilty, and the trial judge imposed upper terms at sentencing relying on facts taken from the probation officer's report. *Id.* at 1245-48. Although the United States Supreme Court has not yet acted on the petition for *certiorari* in *Black*, it has granted *certiorari* in a case holding that California's sentencing scheme survives a Blakely challenge to the imposition of an upper term because the upper term is within the authorized range of punishment. *People v. Cunningham*, 2005 WL 880983 at *9 (No. A103501)(Cal.Ct.App.April 18, 2005) (unpublished memorandum), review denied, People v. Cunningham, No. S133971 (June 29, 2005), cert. granted. Cunningham v. California, 126 S.Ct. 1329 (2006).[5]

A.) Petitioner's Blakely Claims are Barred

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[5] On October 11, 2006, *Cunningham v. California* was argued before the United States Supreme Court.

Blakely dos not apply retroactively to relief sought on collateral review. See *Cook v. United States*, 386 F.3d 949 (9th Cir. 2004) ("the Supreme Court has not made *Blakely* retroactive to cases on collateral review"); accord *Cooper-Smith v. Palmateer*, 397 F. 3d 1236, 1246 (9th Cir. 2005).

Therefore, since Petitioner seeks collateral review of his sentence, his claim that the upper term sentences imposed by the trial judge violated *Blakely* is barred.

B.) Blakely is inapplicable

Even if Petitioner's *Blakely* claims are not barred, it is well settled that *Blakely* is also inapplicable in a case where a Petitioner admits to the facts which the sentencing judge uses to increase a sentence, or if those facts are found by a trial judge following a defendant's knowing and voluntary waiver permitting the sentencing judge to do so. See *Blakely v. Washington*, 542 U.S. at 303; *United States v. Huerta-Pimental*, 445 F.3d 1220, 1223 (9th Cir. 2006).

The record in this case clearly indicates that Petitioner pled no contest with the understanding that the trial judge would impose sentence based on consideration of the sentencing documents. (Respondent's Lodgment No. 2., Vol. 2. , at 132-135). He trial judge based Petitioner's sentence on the information contained in the sentencing

documents presented to him. *Id.* It appears, though not clearly, that the trial judge adopted the recommendations of the probation officer with respect to aggravating and mitigation factors. (Lodgment No. 1, Vol. 2., at 198, 203). The only mitigation factor contained in the probation report was Petitioner's insignificant criminal history. (Lodgment No. 2., Vol. 2, at 159). The factors in aggravation included are: (1) the manner of the crimes indicated planning, sophistication, and professionalism, and (2) additional criteria reasonably related to the decision being made- numerous victims not charged in the indictment. (Lodgment No. 2, Vol. 2 at 159). These aggravating factors are both statutory factors that could have been considered had there been a trial. See Black, 35 Cal.4th at 1248.)

C. Record of Aggravating Factors

Under § 1170 (b), the trial court may properly rely on evidence introduced at the sentencing hearing and on the probation officer's report. In doing so, the trial court must state which factors, if any, are used in aggravation. Here, that did not occur. (Lodgment No. 1, Vol. 2, at 193-198).

Petitioner asserts that here, the trial judge erred in failing to state upon which factors he relied in aggravation of count 33 and the

imposition of the § 186.11 (a)(2) enhancement. (Lodgment No. 3.) No language has been discovered in the sentencing dialogue of the trial judge that supports the imposition of the upper term on count 33 or for the §186.11 enhancement.

D.) Harmless Error

If Blakely were to apply retroactively on relief sought for collateral review and was applicable here (which it is not), any violation of *Blakely* was harmless, particularly in light of Petitioner's possible and ultimate sentence, the number of victims and the number of separate instances of criminal conduct. [6] See United States v. Lyons, 454 F.3d 968 (9th Cir. 2006)(holding that Booker error is subject to harmless error review). "[B]efore a federal constitutional error can be held harmless, the court must be able to declare a belief that it was harmless beyond a reasonable doubt." *Chapman v. California*, 386 U.S. 18, 24 (1967). Further, the state bears the burden of providing that the sentencing court's error was "harmless". *United States v. Beng-Salazar*, 452 F.3d 1089, 1096 (9th Cir. 2006).

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[6] Petitioner's possible exposure in this case was 110.6 to 117 years imprisonment. Petitioner pled no contest to 144 offenses and admitted both enhancements alleged in the information.

Here, as the Court of Appeal noted, "the trial court carefully imposed a sentence of 30 years by specifying a sentence on each of the 144 counts, some being the upper term, some consecutive terms and some concurrent terms. With 144 counts, there were innumerable combinations that would result in a 30-year term- many of which would not require imposition of the upper term on any count." (Lodgment No. 6, at 13). Therefore, to remand this matter for sentencing would be illogical given the obvious ability of the trial court to have imposed a 30 year sentence without imposing the upper term on any of the 144 counts to which Petitioner pled no contest.

Under the circumstances, where Petitioner admitted both enhancements when he pled no contest, because there are facts in the record that indicate that the enhancements were proper, and because a 30 year sentence could have been imposed without imposing an upper term, any error by the trial court judge in failing to state those facts on the record is harmless. As a result, Petitioner's Petition For Writ of Habeas Corpus is DENIED.

However, mindful of the fact that related issues have been recently litigated in the United States Supreme Court, the Court ISSUES a Certificate of Appealability with respect to the

claims presented in the Petition. See *Lambright v. Stewart*, 220 F.3d 1022, 1024-25 (9th Cir. 2000) [providing the threshold of a "substantial showing of the denial of a constitutional right, " is met by demonstrating that: (1) the issues are debatable among jurists of reason; or (2) that a court could resolve the issues in a manner, or (3) that the question are adequate to deserve encouragement to proceed further].

DATED: December 7, 2006

S/ Leo S. Papas

Hon. Leo S. Papas

U.S. Magistrate Judge

APPENDIX C

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

CARMEN JOHN PALMIERI petitioner- Appellant, v. GEORGE GIURBINO, Respondent- Appellee.	No.: 06-56739 D.C. No. CV-06-01201 LSP Southern District of California, San Diego ORDER

Before; T.G. NELSON, IKUTA, and N.R. SMITH, Circuit Judges.

Appellant's petition for panel rehearing is DENIED.

APPENDIX D

Court of Appeal, Fourth Appellate District, Division One- No. D043617

S134203

IN THE SUPREME COURT OF CALIFORNIA

En Banc

THE PEOPLE, Plaintiff and Respondent,
v.
CARMEN JOHN PALMIERI, Defendant and Appellant.

Petition for review is denied without prejudice to any relief to which defendant might be entitled upon finality of People v. Black (June 20, 2005, S126182) __ Cal.4th __. 2005 WL 1421815 <http://www.courtinfo.ca.gov/opinions/documents/S126182.PDF> regarding the effect of Blakely v. Washington (2004) 542 U.S. __, 124 S.Ct. 2531, and United States v. Booker (2005) 543 U.S. __, 125 S.Ct. 738, on California law.

Brown, J., was absent and did not participate.

George
Chief Justice

APPENDIX E

NOT PUBLISHED IN OFFICIAL REPORTS

COURT OF APPEAL, FOURTH APPELLATE

DISTRICT

DIVISION ONE

STATE OF CALIFORNIA

THE PEOPLE,	D043617
Plaintiff and Respondent,	
v.	(Super. Ct. No. SCD170477)
CARMEN JOHN PALMIERI,	
Respondent- Appellant.	

APPEAL from a judgment of the Superior Court of San Diego County, Frank A. Brown, Judge. Affirmed.

Defendant Carmen John Palmieri was charged by information with 58 counts of grand

theft (Penal Code, § 487, subd. (a)),[1] 58 counts of making a false statement in connection with the sale of a security (Corp. Code §§ 25401, 25540), and 28 counts of theft over $400 from an elderly or dependant adult (§ 368, subd. (d)). The information specially alleged the aggregate losses from the victims exceeded $2.5 million, within the meaning of section 12022.6, subdivision (a)(4), and Palmieri engaged in a pattern of fraudulent conduct that involved the taking of more than $500,000, within the meaning of section 186.11, subdivision (a)(2). Palmieri pleaded no contest to all 144 counts and admitted the special allegations.

The Court sentenced Palmieri to a prison term of 30 years. Palmieri contends the sentence violates *Blakely v. Washington* (2004) __ U.S. __ [124 S.Ct. 2531] (*Blakely*), because there was no jury determination of the factual issues the court used as the basis for imposing the upper terms on the principal term and enhancements and for imposing consecutive rather than concurrent sentences on the convictions. The People argue appellate review of Palmieri's constitional challenge to his sentence under the United States Supreme Court's *Blakely* decision is foreclosed because he did not obtain a

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[1] All statutory references are to the Penal Code unless otherwise specified.

certificate of probable cause. The People also assert Palmieri waived or forfeited the issue by not raising a challenge to the sentences in the proceedings below, *Blakely* is inapplicable to California's sentencing scheme, and even if *Blakely* might apply to some California cases, any error was harmless.

I.

FACTUAL AND PROCEDURAL BACKGROUND

A. Factual Basis for the Plea

Over a three-year period, Palmieri defrauded approximately 190 investors of approximately $13 million. Twenty-eight of the investors were over 65 years old. Palmieri solicited victims to invest in viatical contracts[2] through Palmieri's settlement company, National Medical

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[2] A viatical contract involves the purchase of life insurance policy for the life of a terminally ill person (the viator) by a settlement company. The settlement company reviews the medical history of the viator and solicits funds from the potential investors to fund the purchase of a life insurance policy. Viators benefit by receiving payments while they are still alive, and investors receive a proportionate percentage of the policy benefits upon the death of the viator.

Funding, using an ostensibly independent escrow company, Trust Management Services. However, Palmieri in fact controlled Trust Management Services.

Investors were told Trust Management Services was an independent escrow company, and they should deposit their funds with Trust Management Services to invest in viatical contracts. Soon after they deposited their money with Trust Management Services, investors received a letter from Trust Management Services confirming their deposit. The investor also received a letter from National Medical Funding purporting to confirm the name of the viator, the name of the viator's life insurance company, and purporting to confirm the investor had listed as an irrevocable beneficiary on that viator's life insurance policy.

Subsequent investigation revealed no legitimate viatical contracts had been sold to viators during the three-year period, and non of the money deposited into Trust Management Services had been used to purchase any viatical settlement contracts on behalf of the victims. Instead, approximately $13 million of the funds deposited by the victims into Trust Management Services had been withdrawn and paid to Palmieri or his companies.

B. The Guilty Plea and Sentencing

Palmieri pleaded no contest to all 144 counts and admitted the special allegations. The court sentenced Palmieir to a 30-year prison term. The sentence was composed of an upper term of four years for the section 368, subdivision (d) theft alleged in Count 33, consecutive one-year terms (1/3 the mid-term) on 17 other counts alleging theft in violation of section 368, subdivision (d). The court also imposed a consecutive five-year upper term for the section 186.11, subdivision (a)(2) enhancement and a consecutive four year term for the section 12022.6, subdivision (a)(4) enhancement. The court imposed concurrent terms on 40 of the other counts, and stayed the sentence on the remaining counts under section 564.

II.

THE CERTIFICATE ISSUE

The People contend Palmieri cannot raise the *Blakely* issue on appeal because he did not obtain a certificate of probable cause pursuant to section 1237.5. A defendant may not generally bring an appeal from a judgment of conviction entered on a plea excerpt on grounds going to the legality of the prOceedings, including the validity of the plea. (*People v.*

Mendoza (1999) 19 Cal.4th 1984, 1095.) To challenge the validity of a guilty plea, the defendant must obtain a certificate of probable cause from the superior court based on a statement showing "reasonable constitutional, jurisdictional, or other grounds going to the legality of the proceedings." (§ 1237.5; Cal. Rules of Court, rule30 (b)(1); *People v. Pannizzon* (1996) 13 Cal.4th 68, 74) The purpose of the certificate requirement is to promote judicial economy to screening out wholly frivolous guilty plea appeals, based on assumption that a conviction arising from a guilty plea does not generally present issues warranting appellate relief. (*People v. Mendoza*, supra, 19 Cal.4th at p. 1095.) The People argue that since Palmieri was convicted of and sentenced for offenses based on his no contest plea, he was required to obtain a certificate of probable cause to challenge the sentence on appeal.

However, section 1237.5 is subject to exceptions. In People v. Buttram (2003) 30 Cal.4th 773, the Supreme Court noted one of those exceptions applies to "issues regarding proceedings held subsequent to the plea for the purpose of determining the degree of the crime and the penalty to be imposed. [Citations]" (*Id.* At p. 780) Similarly, rule 30 (b)(4)(B) of the California Rules of Court provides a defendant need not obtain a certificate of probable cause

if the notice of appeal states the appeal is based on "grounds that arose after entry of the plea and do not affect the plea's validity." Thus, when the defendant seeks to attack only the validity of his sentence, not the validity of the plea itself, a certificate is not necessary. (*Butram*, at pp. 784-785.)

When a no contest plea is made pursuant to plea bargain, whether a certificate of probable cause is required to challenge the sentence on appeal depends on the issue the defendant is actually challenging. "[T]he critical inquiry is whether a challenge to the sentence is in substance a challenge to the validity of the plea, thus rendering the appeal subject to the requirements of section 1237.5. [Citation.]' [Citation.]" (*People v. Bultram* (supra, 30 Cal.4th at p. 782.) A challenge to a sentence is deemed to challenge the validity of the plea "'if the sentence was part of a plea bargain. [Citation.] It does not if it was not...'" (*Id.* At p. 785.)

Here, the sentence imposed was not a component of the plea agreement. When Palmieri pleaded no contest, there was no agreement to any particular prison sentence. Although Palmieri acknowledged he understood the maximum term provided by law, he did not *agree* to a sentence, and did not agree that a maximum sentence or any other sentence would

be lawful. He simply acknowledged his understanding that the usual sentence range would apply. Moreover, the court expressly stated Palmieri's sentence would be solely the decision of the court, negating any implication that any particular sentence or range of sentences was a part of the plea bargain.

For these reasons, the decisions on which the People rely are inapplicable. In *People v. Cole* (2001) 88 Cal.App.4h 850, the plea bargain provided the defendant would plead no contest with the assurance his maximum sentence would be 25 years to life instead of more than 75 years to life it would have been without the bargain. (Id. At pp. 858-859.) The court imposed the 25-year sentence, and the defendant sought to argue on appeal that the sentence was cruel and unusual punishment. The Court of Appeal held the defendant could not make that argument without a certificate of probable cause. The court noted that although the argument was styled as a challenge to the sentence, it really was a challenge to the validity of the plea, because the plea bargain expressly authorized a sentence of up to 25 years to life, the sentence the defendant received, and was a negotiated part of the bargain, given inconsideration for the reduction in exposure. Having agreed to the bargain, the defendant

could not challenge the sentence given pursuant to it. (*Id.* At p. 873.)

Similarly, in *People v. Young* (2000) 77 Cal.App.4th 827, the defendant agreed to a maximum sentence of 25 years to life in return for the prosecution's agreement not to seek consecutive sentences, which would have increased the maximum punishment to 52 years to life. (*Id.* At p. 830.) As in *Cole*, the defendant sought to argue on appeal that the sentence was cruel and unusual punishment. Holding the defendant could not do so without a certificate of probable cause, the court stated: "The prosecution agreed to a maximum sentence of 25 years to life in return for defendant's plea. Yet, defendant now attacks that maximum sentence on the ground that it is cruel and unusual punishment. By arguing that the maximum sentence is unconstitutional, he is arguing that part of his plea bargain is illegal and is thus attacking the validity of the plea." (*Young*, at 832.)

Here, in contrast to Cole and Young, Palmieri is not arguing any part of his plea agreement is illegal. The plea bargain itself did not include an agreement to the 30-year sentence or any other prison sentence. Instead, Palmieri is arguing the sentence imposed by the court, independently of the plea bargain, is

illegal under Blakely. This is a challenge to the sentence, not the plea. No certification of a probable cause is required.[3]

III.

THE *BLAKELY* ISSUES

The trial court imposed the upper term of four years for the section 368, subdivision (d) theft as alleged in count 33, and consecutive one – year term on 17 other section 368, subdivision (d) counts. The court also imposed a consecutive five-year upper term for the section 186.11,

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[3] Even if a certificate of probable cause might be required in other cases involving Blakely challenges to a sentence, we conclude the procedural posture of this case would render the certificate requirement inappropriate. The judgment imposing the sentence in this case was entered, and the appeal therefrom was filed, in January 2004. Blakely was not decided until June 2004. Thus, Pamieri did not know at the time of filing his notice of appeal there was a constitutional sentencing issue pertinent to his guilty plea, and he could not have anticipated the need for a certificate of probable cause to preserve this issue. Accordingly, application of the probable cause certificate requirement would not be appropriate in this case.

subdivision (a)(2) enhancement and a consecutive four-year term for the section 12022.6, subdivision (a)(4) enhancement. Palmieri argues both the consecutive and upper term decisions violated *Blakely* . The People respond Palmieri waived or forfeited the issue by not raising a challenge to the sentences in the proceedings below, Blakely is inapplicable to California's sentencing scheme, and even if Blakely might apply to some California cases, any error here was harmless.

A.) The Issue Is Preserved

The People assert Palmieri waived his right to assert error because he did not object below. In *People v. Scott* (1994) 9 Cal.4th 331 (Scott), the California Supreme Court held a defendant's failure to challenge in the trial court the imposition of an aggravated sentence based on erroneous or flawed information waived that issue for purposes of appeal. However, *Scott's* reasons for its waiver rule—it was necessary to facilitate the prompt detection and correction of error in the trial court, thus reducing the number of appellate claims and preserving judicial resources. (Id. at pp. 351-353)—is a pragmatic rationale unsupportive of the application of the waiver rule here. Prior to *Blakely*, California courts numerous federal courts consistently held there was no constitutional right to a jury trial in

connection with a court's imposition of consecutive sentences. (*People v. Groves* (2003) 107 Cal.App.4th 1227, 1230-1231; *U.S. v. Harrison* (Cir. 2003) 340 F.3d 497, 500; *U.S. v. Lafayette* (D.C. Cir. 2003) 337 F.3d 1043, 1049-1050; *U.S. v. Hernandez* (7th Cir. 2003) 330 F.3d 964, 982; *U.S. v. Davis* (11th Cir. 2003) 329 F.3d 150, 1254; *U.S. v. Lott* (10th Cir. 2002) 310 F.3d 1231, 1242-1243; *U.S. v. White* (2d Cir. 2001) 240 F.3d 127, 136.) No published case in California held that a different rule applied in connection with the imposition of an upper term. Considering this state of the law, an assertion of a constitutional challenge to the imposition of an upper term or consecutive sentence would not have achieved the purpose of prompt detection and correction of error in the trial court. Further, because *Blakely* was decided after Palmieri's sentencing, he cannot be said to have knowingly and intellectually waived his right to a jury trial. (See Blakely, supra, 124 S.Ct. at p. 2541 [noting that "[I]f appropriate waivers are procured, "a state is free to utilize judicial fact-finding in its sentencing scheme].) Under these circumstances, it would be unreasonable to find Palmieri waived or forfeited a constitutional challenge of which he was unaware, and we find the waiver rule inapplicable.

B. *Blakely's* Applicability to Upper Term Determinations and Consecutive Sentences

Because Palmieri's sentence constitutes a blend of upper and consecutive terms for his offenses, we examine separately *Blakely's* application to each of those questions.

1. *Blakely Applies to Upper Term Determinations*

In *Blakely*, the United States Supreme Court held that "'[o]ther than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum [of the standard range] must be submitted to a jury, and proved beyond a reasonable doubt.'" (*Blakely, supra,* 124 S.Ct. at p. 2356.) The question of whether *Blakely* precludes a trial court from making findings on aggravating facts in support of an upper term in currently under review by the California Supreme Court. (*People v. Towne*, review granted July 14, 2004, S125677; *People v. Black*, review granted July 28, 2004, S126182.) Pending resolution of the issue by the high court, we first determine whether *Blakely* applies here.

Under California's determinate sentencing law, where a penal statute provides for three possible terms for a particular offense, the court is required to impose the middle term unless it finds, by a preponderance of the evidence, that the

circumstances in aggravation outweigh the circumstances in mitigation. (§1170, subd. (b); Cal. Rules of Court, rule 4.420(c), (d).) The People argue imposition of an upper term under the California determinate sentencing scheme is not the same as "the imposition of a penalty beyond the standard ranges" and thus does not implicate *Blakely*. Although an upper term is a "statutory maximum" penalty in the sense it is the highest sentence a court can impose for a particular crime, it is not necessarily the "maximum sentence a judge may impose *solely on the basis of facts reflected in the jury verdict or admitted by the defendant*," which is the relevant standard for purposes of applying *Blakely*. (*Blakely, supra,* 124 S.Ct. at p. 2357; see *Apprendi v. New Jersey* (2000) 530 U.S. 466, 491-497 [state hate crime statute authorizing the imposition of an enhanced sentence based on a judge's finding of certain facts by a preponderance of the evidence violated the due process clause]; *Ring v. Arizona* (2002) 536 U.S. 584, 592-593.)

As explained in *Blakely*, when the judge's authority to impose a high a higher sentence depends on the finding of one or mroe additional facts, "it remains the case that the jury's verdict alone does not authorize the sentnece," as required to comply with constiutional principles. (*Blakely, supra,* 124 S.Ct.

at p. 2538.) The same is true here. Because the maximum penalty the court can impose under California law without making additional factual findings is the middle term, *Blakely* applies to upper term determinations.

2. Blakely Does Not Apply To Consecutive Sentences

However, the same conclusion does not apply to the trial court's selection of consecutive, rather than concurrent, sentences on the some of the counts. *Blakely* has no application because California's sentencing scheme confers no *right* on defendant to concurrent sentencing. As explained in *People v. Reeder* (1984) 152 Cal.App.3d 900, 923: "While there is a statutory presumption in favor of the middle term ... , there is no comparable statutory presumption in favor of concurrent rather than consecutive sentences for multiiple offenses except where consecutive sentencing is statutorily required. The trial court is required to determine whether a sentence shall be consecutive or concurrent but it is not required to presume in favor of concurrent sentencing." Absent a statutory presumption in favor of a concurrent sentence, a guilty plea on more than one offense authorizes a consecutive sentence for each of those offenses. This lack of statutory entitlement to a particular sentence "makes all the difference insofar as judicial

impingement upon the traditional role of the jury is concerned." (*Blakely, supra,* 124 S.Ct. at p. 2540.)

3. *Conclusion*

We conclude the trial court may properly impose consecutive terms without offending *Blakely*. However, because the court imposed the upper term on Count 33 and the section 186.11, subdivision (a)(2) enhancement, the sentence violates *Blakely*.

C. The Sentence Need Not Be Reversed and Remanded for Resentencing

The People argue that, even if *Blakely* requires jury findings on facts justifying selection of the upper term in some cases, the error was harmless beyond a reasonable doubt.[1] The People argue that the court imposed a total term of 30 years, and the court could have

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[1] The People do not suggest the harmless error standard of *People v. Watson (1956)* 46 Cal.2d 818, 836 should be applied, but instead argue the error is "clearly harmless," apparently invoking the constitutional harmless error standard of *Chapman v. California* (1967) 386 U.S. 18, 24. We therefore apply *Chapman* in this matter.

achieved the same result without any upper term components by imposing consecutive terms on some of the counts that it chose to impose concurrently. Accordingly, a remand would be futile because Palmierir would receive the same term.

We conclude that, beyond a reasonable doubt, Palmieri would not have received a more favorable sentence had the trial court been aware of and applied the strictures of *Blakely*. The probation officer's report cited only two factors in aggravation, both of which appear to be factors within the ambit of *Blakely*, and the People do not suggest there were any non-*Blakely* factors to support the upper terms imposed here. However, our review of the transcript of the extensive sentencing hearing shows the trial court, with the option to grant probation or impose a sentence up to a 60-year prison term, decided the appropriate sentence was a 30-year prison term. The trial court carefully imposed a sentence of 30 years by specifying a sentence on each of the 144 counts, some being the upper term, some consecutive terms and some concurrent terms. With 144 counts there were innumerable combinations that would result in a 30-year term -- many of which would not require imposition of the upper term on any count. Based on the statements of the trial court at the sentencing hearing, we conclude that

beyond a reasonable doubt the court would on remand impose the same total term without imposition of any upper terms, and therefore we believe it is appropriate not to remand to allow the court to resentence Palmieri. The imposition of some upper terms in this case was not prejudicial error.

DISPOSITION

The judgment is affirmed.

S/ McDonald
McDonald, J.

I CONCUR:

S/Haller
Haller, Acting P.J.

I CONCUR IN THE RESULT

S/IRION
Irion, J.